

A **Golden Connection Sdn Bhd v CSH Enterprise
 Sdn Bhd**

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO 24—

B 162-94
 ZALEHA ZAHARI JC
 12 MAY 1995

C *Land Law* — *Strata titles* — ‘*Common property*’ — *Void above ground level* —
 Whether capable of being used in connection with the enjoyment of more than one parcel
 — *Reconstruction of void by ground floor owner for its exclusive use* — *Whether*
 mezzanine floor owner entitled to seek payment for loss of enjoyment of void — *Strata*
 Titles Act 1985 s 4

Words and Phrases — ‘*Common property*’ — *Strata Titles Act 1985 s 4*

D The defendant was the owner of certain land on which it constructed
 a 4½-storey building, consisting of shop lots and flats which have
 been sold to various purchasers. The defendant had initially retained
 for its own use one ground floor unit of the building (‘the unit’). On
E 30 April 1984, the defendant sold the unit to a purchaser, who
 subsequently sold the unit to the plaintiff. The layout plan of the
 mezzanine floor revealed that there was a void above the ground floor
 of the unit. Upon the purchase of the unit, the plaintiff, believing that
 the void above the ground floor belonged exclusively to it as ground
 floor owner, proceeded to carry out construction work, converting
 the void and creating a whole new floor above the ground floor with
F a separate access. Later, on attempting to obtain a loan on the
 property, the plaintiff’s bank required the defendant to endorse its
 acknowledgment on the loan agreement and deed of assignment
 executed by the plaintiff in favour of the bank as the strata title to the
 property had not been issued yet. The defendant was also required to
 give an undertaking to the plaintiff’s bank that the defendant will
G deliver to the plaintiff’s financier the issue document of strata title
 upon the issuance of such strata title together with a valid and
 registrable memorandum of transfer. Meanwhile, the owner of the
 mezzanine floor had complained to the defendant about the
 construction work carried out by the plaintiff to cover the void, as he
 claimed he was also entitled to the use of the void. Negotiations were
H held between the plaintiff, the defendant and the owner of the
 mezzanine floor. It was contended by the defendant that the plaintiff
 had agreed to pay RM30,000, to be divided equally between the
 defendant and the mezzanine floor owner. However, the plaintiff
 subsequently refused to pay the sum, and alleged that the request for
I payment by the defendant was an ‘extortion’ on the plaintiff in
 exchange for granting its consent and undertaking. The defendant
 refused to provide the consent and undertaking requested. The plaintiff

applied to the court for an order to compel the defendant to endorse the acknowledgment and to make the necessary undertaking. A

Held, dismissing the application:

- (1) It was evident from the plans that the void on the level of the mezzanine floor was capable of being used in connection with the enjoyment of both the mezzanine floor owner as well as the ground floor owner. Therefore, the void was 'common property' within the meaning of s 4 of the Strata Titles Act 1985. The duty of maintaining the void, therefore, rested with the defendant developer as no management corporation had been established yet. B C
- (2) The covering of the void had clearly affected the enjoyment and use of that common property by the mezzanine floor owner. The mezzanine floor owner had, therefore, properly lodged his complaint to the defendant. The defendant was, accordingly, justified in seeking some compensation for the mezzanine floor owner for loss of enjoyment of the void, as well as for itself towards purchase of the void space. D
- (3) The unilateral attempt by the plaintiff to back out from the agreement arising from negotiations held by all parties concerned and the subsequent accusations and allegations that the payment agreed upon was tantamount to an 'extortion' was wholly unwarranted. E

[Bahasa Malaysia summary]

Defendan merupakan pemunya tanah yang tertentu, yang telah mendirikan sebuah bangunan 4½ tingkat, yang terdiri daripada rumah kedai dan rumah pangsa yang telah dijual kepada beberapa pembeli. Defendan pada mulanya telah menyimpan satu unit tingkat bawah bangunan itu ('unit itu') untuk kegunaannya sendiri. Pada 30 April 1984, defendan telah menjual unit itu kepada seorang pembeli yang kemudiannya telah menjual unit itu kepada plaintiff. Pelan susun atur tingkat mezanin menunjukkan bahawa terdapat satu ruang kosong di atas tingkat bawah unit itu. Selepas membeli unit itu, plaintiff, yang mempercayai bahawa ruang kosong di atas tingkat bawah itu adalah kepunyaannya secara eksklusif sebagai pemunya tingkat bawah, telah menjalankan kerja pembinaan untuk mengubahsuaikan ruang kosong itu dan membina satu tingkat yang baru di atas tingkat bawah itu, yang mempunyai jalan masuk yang berasingan. Kemudiannya, dalam percubaan plaintiff untuk membuat permohonan untuk satu pinjaman terhadap hartanah itu, bank plaintiff mengkehendaki defendan memberikan pengindorsannya pada perjanjian pinjaman dan suratikatan penyerahhakan yang telah disempurnakan oleh plaintiff bagi faedah bank, kerana hakmilik strata kepada hartanah itu masih F G H I

- A belum dikeluarkan. Defendan juga dikehendaki memberikan akujanji kepada bank plaintif bahawa defendan akan menyerahkan kepada bank plaintif surat hakmilik strata keluaran sebaik sahaja ianya dikeluarkan, bersama dengan satu memorandum pindahmilik yang sah dan boleh didaftarkan. Sementara itu, pemunya tingkat mezanin
- B telah membuat aduan kepada defendan tentang kerja pembinaan yang telah dijalankan oleh plaintif untuk menutup ruang kosong itu. Dia mendakwa bahawa dia juga berhak menggunakan ruang kosong itu. Rundingan telah diadakan di antara wakil-wakil plaintif, defendan dan pemunya tingkat mezanin itu. Telah diujahkkan bahawa satu perjanjian telah dicapai di mana plaintif akan membuat beberapa bayaran kepada defendan dan pemunya tingkat mezanin itu.
- C Defendan mendakwa bahawa jumlah yang dipersetujui adalah RM30,000, yang akan dibahagi dua antara defendan dan pemunya tingkat mezanin. Walau bagaimanapun, plaintif kemudiannya enggan membayar, dan mengatakan bahawa permintaan oleh defendan untuk
- D bayaran adalah satu 'pemerasan' ke atas plaintif sebagai balasan untuk pemberian persetujuan dan akujanjinya. Lalu, defendan pun enggan memberikan persetujuan dan akujanji yang diminta itu. Plaintif memohon kepada mahkamah untuk suatu perintah untuk memaksa defendan memberikan pengindorsan dan memberikan janji yang
- E diperlukan.

Diputuskan, menolak permohonan itu:

- (1) Adalah jelas daripada pelan itu bahawa ruang kosong pada tingkat mezanin boleh digunakan untuk faedah kedua-dua pemunya tingkat mezanin dan unit tingkat bawah. Oleh itu, ruang kosong itu adalah 'hartanah sepunya' mengikut makna s 4 Akta Hakmilik Strata 1985. Lantaran itu, tugas menyelenggarakan ruang kosong itu adalah terletak pada defendan kerana perbadanan pengurusan masih belum ditubuhkan.
- (2) Penutupan ruang kosong itu jelasnya telah menjejaskan hak pemunya tingkat mezanin untuk menggunakan dan menikmati hartanah sepunya itu. Maka, adalah berpatutan bahawa pemunya tingkat mezanin telah membuat aduan kepada defendan. Ekoran itu, defendan berjustifikasi untuk menuntut pampasan bagi pihak pemunya tingkat mezanin, atas kehilangan haknya untuk menikmati ruang kosong itu, dan bagi pihaknya sendiri, atas pembelian ruang kosong itu.
- (3) Percubaan satu pihak oleh plaintif untuk mengundur diri daripada perjanjian yang dicapai berikutan daripada rundingan yang diadakan oleh semua pihak yang terlibat, dan dakwaan yang dibuatnya kemudian, bahawa bayaran yang dipersetujui itu adalah bersamaan dengan satu 'pemerasan' memang tidak mempunyai alasan.]

Notes

For cases on strata title, see 8 *Mallal's Digest* (4th Ed) paras 2028–2033.

Case referred to

Lim Seang Mee v Keepeahead Holdings Sdn Bhd [1992] 3 CLJ 1445 (distd)

Legislation referred to

Strata Titles Act 1985 s 4

K Mamiam (Sykt KL Rekhray) for the plaintiff.

Lakshmi Ganesh (Lakshmi Ganesh) for the defendant.

Zaleha Zahari JC: By this application, Golden Connection Sdn Bhd ('the plaintiff') claims for the following declaratory orders:

- 1 That the court orders and directs the defendant to:
 - (a) endorse its acknowledgement on a deed of assignment executed by the plaintiff in favour of a bank enabling the plaintiff to obtain a loan from the bank; and
 - (b) give its undertaking to the plaintiff's financier that the defendant will deliver the issue document of strata title upon the issuance of such title to the plaintiff's financier together with a valid and registrable memorandum of transfer;
- 2 That the defendant is only entitled to impose not more than RM500 as fees for endorsement on the deed of assignment and for giving its undertaking to the bank granting the loan.

The antecedent events leading to this application are as follows:

CSH Enterprise Sdn Bhd ('the defendant') is the registered proprietor of lands held under HS(D) 47923 PT 297, HS(D) 41924 PT 296 and HS(D) 41025 PT 299, all in Section 72, Bandar Kuala Lumpur (now held under Geran 8127, 8128 and 8129 for Lots 1987, 298 and 299 respectively, all in Section 72 in Bandar Kuala Lumpur). The defendant has developed the said lands and constructed thereon a 4½ storey building of shop lots and flats which have been sold to various purchasers. The defendant had initially retained as its own, one (1) unit ground floor of the said building. On 30 April 1984, the defendant sold the said unit to one Naina Mohamed a/l MNS Abu Bakar ('the initial purchaser').

According to the sale and purchase agreement executed between the defendant and the initial purchaser, the lot acquired by the initial purchaser in relation to the other lots stated was as described in the layout plan. The layout plan is as shown in exh 'D8' of Chua Kon Thong's affidavit in reply affirmed on 5 July 1994 (encl 5) (hereinafter referred to as 'Chua's affidavit in reply'). It shows the ground floor plan, the measurement

A boundaries and area of the lot. The plan of the mezzanine floor reveals that above the ground floor of the unit concerned is a void (exh 'C' annexed to Balasingam a/l V Sethu's affidavit affirmed on 25 February 1994, hereinafter referred to as 'Balasingam's affidavit').

B On 11 February 1993, the initial purchaser sold the ground floor unit that had been acquired from the defendant to the plaintiff (exh 'A' to Balasingam's affidavit).

C Upon the purchase of the said ground floor unit, the plaintiff, acting under a belief that the void above the ground floor belonged exclusively to them as the ground floor owner, proceeded to carry out construction work which covered the void above the ground floor. It is not in issue that as a result of the changes made by the plaintiff, a whole new floor area had been created. The plaintiff now has two floors instead of one, the new floor having its own separate access.

D The plaintiff was desirous of obtaining a loan. As the strata title to this property has not to date been issued, the plaintiff's financier, the Bank of Commerce, acting within accepted conveyancing and banking practice, required the defendant to endorse its acknowledgement on the loan agreement cum deed of assignment executed by the plaintiff in favour of the bank. The defendant was also required to give an undertaking to the plaintiff's financier that the defendant will deliver to the plaintiff's financier the issue document of strata title upon the issuance of such strata title together with a valid and registrable memorandum of transfer.

F The defendant declined to give the endorsement and undertaking requested for the following reasons. According to para 7 of Chua's affidavit, sometime in April/May 1992, the owner of the mezzanine floor, How Kok Lim, had complained to the defendant of the construction being carried out by the plaintiff in relation to the covering of the void. According to him, upon verifying the complaint to be true, and by then the defendant had received the request by the plaintiff's financier to give its consent on the deed of assignment to the Bank of Commerce, there were negotiations between the representatives of the plaintiff, the defendant and the owner of the mezzanine floor with regard to the construction being carried by the plaintiff in the void space. It was contended, arising from the discussion held, there was an agreement that the plaintiff would make some payments to the defendant and the mezzanine floor owner. The sum agreed upon, however, appears to be in dispute.

H Plaintiff's letter dated 25 May 1993 to the defendant, (exh 'D' of Balasingam's affidavit) states:

We write to confirm as follows:

- I 1 We shall pay the sum of RM20,000 being the full and final settlement for the purchase of the open space at the above premises.
- 2 You shall do all necessary things that the purchase is successfully completed [sic].

- 3 The payment for the purchase of the open space shall be made vide an open cheque which is to be presented for payment upon our confirmation that the above property has been charged in favour of the Bank of Commerce. We enclose herewith Bank of Commerce cheque No 353860 for the sum of RM20,000 drawn in your favour. A
- 4 You shall give your consent to enable us to charge the abovesaid property to the Bank of Commerce. B

From the above letter, it would appear that the plaintiff was agreeable to 'purchase' the open space above the premises.

There then appears to be a change of heart on the part of the plaintiff. It would appear that the plaintiff subsequently contended that the payment was not in respect of the 'purchase' of the open space above the premises, but alleged that it was an 'extortion' on the part of the plaintiff for granting its consent and undertaking. C

It was the defendant's case that the payment of RM20,000 offered by the plaintiff was inconsistent with the decision of the meeting held between the plaintiff together with the defendant and the mezzanine floor owner (para 10 of Chua's affidavit). It was contended that the payment agreed was not RM20,000 but RM30,000; RM15,000 being payment to the defendant and the other RM15,000 being payment to the owner of the mezzanine floor. D

Exhibit 'G' to Balasingam's affidavit, letter from the defendant's lawyer to the plaintiff's lawyer, dated 14 July 1993 in uncategorical terms states: E

Our clients are amazed and, completely taken aback by your client's allegations of 'extortion'. The payment for consent never arose. Discussions were held relating to the renovations and were attended to by representatives from your client's office, our client's offices and the owner of the mezzanine floor. Our client only became aware of the construction when the owner of the mezzanine floor complained to our client that his right to light and ventilation had been taken away and that he could not even open his fire resistant door (creating thereby a fire hazard for him). F

We are informed that your client then offered to pay compensation of RM15,000 to the owner of the mezzanine floor and RM15,000 to our client for breach of contract, the new floor, etc. Your client thereafter forwarded to our clients a cheque for a lesser sum. The amount was not acceptable to the two concerned parties and the cheque was returned to your client. G

Our client vehemently protests the accusation, the use of the term 'extortion' and seek an apology for the same. Our clients reiterate that all discussions were amicable. H

In these circumstances, the defendant has not given its consent or the undertaking requested. The defendant was of the view that the issue whether the void belongs to the plaintiff or whether it forms part of the common property, has to be resolved first. According to para 20 of Chua's affidavit: I

The defendant cannot give its consent or the undertaking required because:

- A (a) the defendant may be deemed to have consented to the assignment of the new floor in favour of the financial institution; and
(b) the defendant may have undertaken to deliver a strata title for the new floor.

B The defendant was further of the view that having absolutely assigned the ground floor to the initial purchaser which was subsequently assigned to the plaintiff, the defendant has no more interest in the same, except for the void, which it considered, common property (para 21). Accordingly, it was the defendant's further contention that the plaintiff was free to execute any assignment in favour of any person or party, and the defendant's only obligation was to take note of the same. Further, the defendant contended
C that the construction of the new floor over the common property and retaining it for the plaintiff's own use was a contravention of the terms of the agreement dated 30 April 94.

D Upon the defendant's failure to adhere to the request of the plaintiff to endorse the acknowledgment on the deed of assignment in favour of the Bank of Commerce, and to give the undertaking requested of them by the plaintiff, the plaintiff has filed this application.

E Encik Maniam, counsel for the plaintiff, submitted that the defendant has no right to seek payment for the void space above the ground floor. According to him, this demand was but an attempt to squeeze money from the plaintiff, as the plaintiff would not be able to obtain a loan without such an undertaking from the defendant. Encik Maniam submitted that the defendant was under a legal obligation to endorse the assignment of the property and to give the letter of undertaking requested. In the circumstances of this case, he submitted, that the defendant was only entitled to payment of an administrative fee for endorsing the deed and providing the letter of undertaking. The amount of RM30,000 was,
F according to him, but a disguise to 'extort' an excessive administrative fee from the plaintiff.

G The decision for the Hon Datuk Mohamed Dzaiddin bin Haji Abdullah J (as he then was) in *Lim Seang Mee v Keepeahead Holdings Sdn Bhd* [1992] 3 CLJ 1445, which has been upheld by the Supreme Court, was cited as authority that the defendant was only entitled to an administrative fee, and that the fee the defendant can impose for endorsing the deed of assignment and giving the undertaking is limited to the sum RM500.

H Cik Lakshmi Ganesh submitted that, on the facts of this case, all that the plaintiff purchased was a ground floor unit with a void above it. According to her, the void space was not for the exclusive enjoyment of the plaintiff, but to be enjoyed also by the owner of the mezzanine floor. The plan of the ground floor and mezzanine floor (exh 'D8' to Chua's affidavit)
I was shown as evidence in support, that the void, being on the level of the mezzanine floor, does not form part of the property purchased by the plaintiff for its exclusive use. It was the defendant's counsel submission that the plaintiff has created a new floor in respect of an area not reserved

for its exclusive use, but to be shared equally with the proprietor of another lot, ie the mezzanine floor owner.

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Cik Lakshmi further submitted that from the affidavit evidence disclosed and in the circumstances that had transpired, it is clear that it was not that the defendant was not prepared to endorse the deed of assignment or give the letter of undertaking requested. The defendant had notified the plaintiff of its willingness to give the endorsement and undertaking conditional, however upon the plaintiff giving its confirmation that the property to be assigned is exclusive of the floor created by the plaintiff. The plaintiff has, to date, refused to give the confirmation that the property constructed does not form part of the property sold to them and to be assigned. To accept the plaintiff's argument, according to her, would mean that the defendant would be put in a position of having to apply for two strata titles, when all that was sold and acquired by the plaintiff was the ground floor. It was, therefore, Cik Lakshmi's submission that as the plaintiff failed to give the requisite confirmation requested, the defendant had every right in these circumstances to refuse to endorse the deed of assignment as well as to refuse to give the undertaking requested.

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With regard to the decision of Mohamed Dzaidin J in *Lim Seang Mee v Keepahead Holdings*, I observe that the facts of that case is not on all fours with the facts in this case. In *Lim Seang Mee's* case, the property does not appear to have been the subject of any substantial renovation and construction involving an area disputed as to whether it was common property or whether it belonged exclusively to the owner of a particular parcel.

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In making a considered decision on the issue to whom does the 'void' belong, note is taken of the definition of the term 'common property' in the Strata Titles Act 1965 ('the Act'). Section 4 of the Act defines the term as 'so much of the lot as is not comprised in any parcel (including any accessory parcel) or any provisional block as shown in an approved strata plan'. As evident from the plans annexed as exh 'A' to Chua's supplementary affidavit (encl 12 and exh D8 to Balasingam's affidavit), it is clear that, the void on the level of the mezzanine floor is capable of being used in connection with the enjoyment of more than one parcel, ie the mezzanine floor owner as well as the ground floor owner. I therefore hold the void to be 'common property' within the meaning prescribed to it by s 4 of the Act. On the facts in this case the duty of maintaining the void therefore rests with the developer, ie the defendant, by reason of the fact that no management corporation has been established.

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It cannot be denied that the covering of the void had clearly affected the enjoyment of the usage of that common property by the mezzanine floor owner. The mezzanine floor owner has, in my view, properly lodged his complaint to the defendant, as the developer of the building. I agree that the defendant had every right, acting within the powers conferred upon them by the Act, as developer, on behalf of the mezzanine floor owner, to take this matter up with the plaintiff in respect of the plaintiff's usurpation of common property for its exclusive use and detrimental to the

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- A enjoyment of the said common property by the proprietor of the mezzanine floor. The act of the defendant to seek some payment for loss of enjoyment of the void to the mezzanine floor owner as well as towards the purchase of the void space was, in my opinion, justified. The unilateral attempt by the plaintiff to back out from the agreement arising from negotiations held by all parties concerned (which allegation has not been expressly denied and therefore deemed admitted), and the subsequent accusations and allegations that the payment agreed upon is tantamount to an 'extortion', are, in my view, wholly unwarranted.
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I hold that the plaintiff is not entitled to the declaratory orders sought. The application was accordingly dismissed with costs.

- C *Application dismissed.*

Reported by Angela Ho

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